Filed 3/26/19 P. v. Cortez CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN NATHANIEL CORTEZ, Defendant and Appellant.	D073418 (Super. Ct. No. SCS189535)

APPEAL from a judgment of the Superior Court of San Diego County, Ana L. España, Judge. Affirmed.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Erick Swenson and Junichi P. Semitsu, Deputy Attorneys General, for Plaintiff and Respondent.

This is the fourth appeal arising out of Adrian Nathaniel Cortez's conviction for a 2004 gang-related shooting at a park in Chula Vista. This appeal initially proceeded in accordance with *People v. Wende* (1979) 25 Cal.3d 436. However, in supplemental briefing, Cortez argued he was entitled to reversal of his murder conviction under recently enacted Senate Bill No. 1437 (Senate Bill 1437), which amended the felony-murder rule and the natural and probable consequences doctrine as it relates to murder. Because we conclude that Cortez may not avail himself of the ameliorative benefits of Senate Bill 1437 on direct appeal without first filing a petition in the trial court, we affirm the judgment. (*People v. Martinez* (2019) 31 Cal.App.5th 719, 722 (*Martinez*).)

FACTUAL AND PROCEDURAL BACKGROUND

We derive the facts from our prior opinion *People v. Cortez* (Oct. 2, 2008, D049716) [nonpub. opn.] (*Cortez I*).

Cortez was the leader of a criminal gang in Chula Vista called Varrio Chula Vista (VCV). In 2004, a member of a rival gang, Otay, shot VCV gang member Benjamin Moreno. A few weeks later, several VCV gang members met to discuss this shooting. VCV gang members Raymond Pacheco, William Parra, Jacob Sowder, and Jahaziel Fausto attended the meeting. At the meeting, Cortez asked whether anyone would be willing to shoot an Otay gang member to retaliate for the shooting of Moreno. Fausto and Sowder volunteered, and Parra agreed to drive. Cortez gave Fausto a gun.

Pacheco, Parra, Fausto, and Sowder left the meeting in Parra's car. When they saw several people in a public park, Parra parked the car. Fausto exited the car and approached the people in the park, asking them, "Where are you from?" Arturo Manzo,

an Otay gang member said, "Otay." Fausto then shot Manzo with the gun Cortez had given him. When Manzo fell to the ground, Fausto fired more shots at him.

Manzo died. Police found five shell casings within 15 feet of his body. After killing Manzo, Fausto ran back to Parra's car, saying he got "the guy from Otay."

Cortez was charged and tried by jury. At trial, the jury was instructed on three theories in which Cortez could be found guilty of murder: (1) as a member of a conspiracy under the natural and probable consequences doctrine, (2) as an aider and abettor under the natural and probable consequences doctrine, or (3) as a direct aider and abettor.

The jury convicted Cortez (and his codefendant Fausto, the shooter) of conspiracy to commit assault with a deadly weapon or with force likely to produce great bodily injury (count 1) and first degree murder (count 2). (*Cortez I, supra,* at pp. 1-2.) The jury found each defendant committed these offenses for the benefit of a criminal street gang and, with respect to count 2, found that each was a principal in the offense and at least one of them personally and intentionally discharged a firearm causing great bodily injury or death. (*Ibid*.)

The trial court sentenced Cortez to a total term of 76 years to life in prison. (*Cortez I, supra,* at p. 2.) The sentence consisted of a term of 25 years to life, doubled for a strike prior but stayed, as to count 1, and 25 years to life, doubled, plus a consecutive 25 years as to the Penal Code section 12022.53[1] firearm enhancement and one year,

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1 All further statutory references are to the Penal Code unless otherwise indicated.

consecutive, for Cortez's prison prior, on count 2. (*Cortez I*, *supra*, at pp. 41-42.) On appeal, this court affirmed the judgment of conviction, but reversed and vacated various aspects of the sentence. (*Id*. at pp. 41-55.)

On remand, the trial court sentenced Cortez to 51 years to life on count 2, consisting of a 25-year-to-life sentence, doubled, and a one-year consecutive term for Cortez's prison prior, with a concurrent two-year term as to count 1. (*People v. Cortez* (April 14, 2010, D055056) [nonpub. opn.], p. 3 (*Cortez II*).) Cortez again appealed, contending that the resentencing court had erred in not staying the sentence imposed on count 1 and failing to correct his custody credits. (*Id*. at p. 1.) The People also argued that the court had failed to impose any term for the enhancement under section 12022.53, subdivisions (d) and (e)(1), as to count 2, and thus imposed an unauthorized sentence. (*Cortez II*, *supra*, at p. 1.) This court agreed with each of these contentions, reversing the judgment as to the sentence, vacating the sentence and remanding the matter for another resentencing, with directions that the court: (a) stay the sentence on count 1 under section 654, (b) correct the abstract of judgment to accurately reflect Cortez's custody credits, and (c) impose a consecutive 25-year enhancement under section 12022.53, subdivisions (d) and (e)(1) as to count 2. (*Cortez II*, *supra*, at pp. 1-6.)

At the second resentencing hearing, Cortez requested that the court reconsider its earlier rulings denying his motion to strike his strike prior and his motions for a mistrial. The court reiterated its denial of the motions and sentenced Cortez to prison for 76 years, consisting of 25 years to life, doubled, plus a consecutive 25 years for the section 12022.53 enhancement, on count 2 and a consecutive one-year term for the prison prior;

it imposed the low term of two years on count 1, stayed pursuant to section 654. (*People v. Cortez* (March 21, 2011, D058166) [nonpub. opn.], p. 4 (*Cortez III*).)

Cortez filed a third appeal, making no arguments but requesting this court to independently review the record for error as mandated by *Wende*. (*Cortez III, supra,* at p. 4.) We affirmed the judgment. (*Id.* at p. 5.)

In 2014, the California Supreme Court decided *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), which held that an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine. (*Id.* at pp. 158-159.) Relying on *Chiu*, Cortez filed a petition for writ of habeas corpus, asserting he was convicted under the natural and probable consequences doctrine and thus, his first degree murder conviction was unlawful and must be reversed. We granted his habeas corpus petition and vacated the judgment as to the murder charge. (*In re Cortez* (July 14, 2017, D071551) [original proceeding], at p. 20 (*Cortez IV*).) We remanded the case to the superior court with directions to allow the People to accept a reduction of the conviction on count 2 to second degree murder or to retry Cortez for first degree murder under an alternative theory. (*Ibid.*) We further instructed the superior court to resentence Cortez if the People elected not to retry him. (*Ibid.*)

On remand, the People elected not to retry Cortez, whose conviction on count 2 was consequently deemed a conviction for second degree murder. At the resentencing hearing, Cortez requested that the court strike his prior strike and firearm enhancement. The court denied both requests, explaining its reasoning on the record. Cortez was sentenced to a total prison term of 56 years to life, consisting of a 15-year-to-life term,

doubled due to his strike prior, plus a consecutive 25 years to life for the section 12022.53 enhancement and a consecutive one-year term for the prison prior, on count 2. The court stayed the sentence on count 1. It imposed a $10,000 restitution fine, a $10,000 parole revocation restitution fine (suspended unless parole was later revoked), a $80 court security fee, $60 criminal conviction assessment, and awarded Cortez custody credits of 4,625 days (actual time).

Cortez appeals the court's judgment. While this appeal was pending, his appellate counsel notified the superior court of a one-day error in his custody credits calculation and errors in the fees imposed. These errors were corrected by the superior court.

After initially filing a *Wende* brief, Cortez's appellate counsel requested leave to file supplemental briefing in which Cortez asserted an affirmative claim of relief based on recently enacted Senate Bill 1437. We granted Cortez's request to file supplemental briefing and received a responsive brief from the People.

DISCUSSION

The sole issue presented is whether Cortez is entitled to reversal of his murder conviction under Senate Bill 1437 on direct appeal, bypassing the statutory petition procedure for obtaining relief. Cortez argues that Senate Bill 1437 abrogated the natural and probable consequences theory of murder liability and applies retroactively to his conviction based on the principles espoused in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). The People contend that defendants already convicted of murder under the natural and probable consequences doctrine must utilize a specified petition procedure to

seek relief, which Cortez has not done. As we explain, we find merit in the People's contention.

Estrada, supra, 63 Cal.2d 740, held that new laws that reduce the punishment for a crime are presumptively to be applied to defendants whose judgments are not yet final. (*Id.* at p. 742.) In *Estrada*, our high court considered the retroactive application of a statutory amendment that reduced the punishment prescribed for the offense of escape without force or violence. (*Id.* at p. 743.) "The problem . . . is one of trying to ascertain the legislative intent—did the Legislature intend the old or new statute to apply? Had the Legislature expressly stated which statute should apply, its determination, either way, would have been legal and constitutional." (*Id.* at p. 744.) But in the absence of any textual indication of the Legislature's intent, the court inferred that the Legislature must have intended for the new penalties, rather than the old, to apply. (*Id.* at pp. 744-745.) When the Legislature determines that a lesser punishment suffices for a criminal act, there is ordinarily no reason to continue imposing the more severe penalty, beyond simply "satisfy[ing] a desire for vengeance." (*Id.* at p. 745.)

"Because the *Estrada* rule reflects a presumption about legislative intent, rather than a constitutional command, the Legislature . . . may choose to modify, limit, or entirely forbid the retroactive application of ameliorative criminal law amendments if it so chooses. . . . [T]he presumption does not govern when the statute at issue includes a 'saving clause' providing that the amendment should be applied only prospectively." (*People v. Conley* (2016) 63 Cal.4th 646, 656 (*Conley*).) Moreover, "while such express statements unquestionably suffice to override the *Estrada* presumption, the 'absence of an

express saving clause . . . does not end "our quest for legislative intent." ' [Citations.] Our cases do not 'dictate to legislative drafters the forms in which laws must be written' to express an intent to modify or limit the retroactive effect of an ameliorative change; rather, they require 'that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it.' " (*Id*. at pp. 656-657.)

Turning to the new law at issue here, on September 30, 2018, while Cortez's appeal was pending, the Governor signed Senate Bill 1437. "The legislation, which became effective on January 1, 2019, addresses certain aspects of California law regarding felony murder and the natural and probable consequences doctrine by amending sections 188 and 189, as well as by adding section 1170.95, which provides a procedure by which those convicted of murder can seek retroactive relief if the changes in law would affect their previously sustained convictions." (*Martinez, supra*, 31 Cal.App.5th at p. 722.)

"Senate Bill 1437 was enacted to 'amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.' (Stats. 2018, ch. 1015, § 1, subd. (f).) Substantively, Senate Bill 1437 accomplishes this by amending section 188, which defines malice, and section 189, which defines the degrees of murder, and as now amended, addresses felony murder liability. Senate Bill 1437 also adds the aforementioned section 1170.95, which allows those 'convicted of felony murder or murder under a natural and probable consequences

theory . . . [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts . . . .' (§ 1170.95, subd. (a).)" (*Martinez, supra*, 31 Cal.App.5th at p. 723.)

"An offender may file a petition under section 1170.95 where all three of the following conditions are met: '(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine[;] [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder[;] [¶] [and] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.' (§ 1170.95, subd. (a)(1)-(3).)" (*Martinez, supra*, 31 Cal.App.5th at p. 723.)

"Under section 1170.95, subdivision (c), the petition shall include, among other things, a declaration by the petitioner stating he or she is eligible for relief based on all three aforementioned requirements of subdivision (a). A trial court that receives a petition under section 1170.95 'shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section.' (§ 1170.95, subd. (c).) If the petitioner has made such a showing, the trial court 'shall issue an order to show cause.' (§ 1170.95, subd. (c).)" (*Martinez, supra*, 31 Cal.App.5th at p. 723.)

"The trial court must then hold a hearing 'to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence.' (§ 1170.95, subd. (d)(1).) 'The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner.' (§ 1170.95, subd. (d)(2).) Significantly, if a hearing is held, '[t]he prosecutor and the petitioner may rely on the record of conviction or *offer new or additional evidence* to meet their respective burdens.' (§ 1170.95, subd. (d)(3).) '[T]he burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.' (§ 1170.95, subd. (d)(3).) 'If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges.' (§ 1170.95, subd. (d)(3).)" (*Martinez, supra,* 31 Cal.App.5th at pp. 723-724, italics added.)

"Section 1170.95, subdivision (f) states: 'This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner.' " (*Martinez*, *supra*, 31 Cal.App.5th at p. 724.)

As in this case, the defendant in *Martinez* claimed that his murder conviction must be reversed on direct appeal based on the *Estrada* rule. The *Martinez* court held otherwise, reasoning that "Senate Bill 1437 is not silent on the question of retroactivity. Rather, it provides retroactivity rules in section 1170.95. The petitioning procedure specified in that section applies to persons who have been convicted of felony murder or murder under a natural and probable consequences theory. It creates a special mechanism that allows those persons to file a petition in the sentencing court seeking vacatur of their conviction and resentencing. In doing so, section 1170.95 does not distinguish between persons whose sentences are final and those whose sentences are not. That the Legislature specifically created this mechanism, which facially applies to both final and nonfinal convictions, is a significant indication Senate Bill 1437 should not be applied retroactively to nonfinal convictions on direct appeal." (*Martinez, supra*, 31 Cal.App.5th at p. 727.) The court in *Martinez* pointed to various other indicia that the Legislature intended for individuals seeking relief to proceed via the petitioning procedure. (*Id.* at pp. 727-728; see *People v. DeHoyos* (2018) 4 Cal.5th 594, 603 (*Dehoyos*) [relief not available on direct appeal where proposition at issue contained specified petition procedure]; *Conley, supra,* 63 Cal.4th at p. 659 [same regarding different proposition].)

In determining that defendants whose convictions are not yet final must follow the specified petition procedure to obtain relief, the *Martinez* court compared Senate Bill 1437 to the propositions at issue in *Conley* and *Dehoyos*—Propositions 36 and 47, respectively. (*Martinez, supra*, 31 Cal.App.5th at pp. 725-727.) Those propositions

allowed defendants to petition for resentencing in accordance with the amended law and required the trial judge to determine the petitioners' risk of danger to public safety. (E.g., *Conley*, *supra*, 63 Cal.4th at pp. 654-655.) *Estrada's* presumption of retroactivity was not controlling since the Legislature had enacted a special procedural mechanism concerning how the law was to be retroactively applied. (*Id*. at pp. 657-658; *Dehoyos*, *supra*, 4 Cal.5th at p. 603.) In addition to lessening the punishment for the applicable crimes, "voters were motivated by other purposes as well, including the protection of public safety," and requiring the trial court to evaluate the petitioners' criminal history struck an appropriate balance. (*Conley*, at p. 658.)

In support of his position that he may bypass the petition procedure and obtain relief via direct appeal, Cortez principally argues that *Martinez* is wrongly decided, an appeal is "otherwise available" to him (see § 1170.95, subd. (f)) as a remedial source, and that unlike Propositions 36 and 47, the trial judge in a Senate Bill 1437 claim need not assess the defendant's risk of danger to public safety. He also argues that, at least in Cortez's specific case, this court is in a better position than the trial court to determine whether Senate Bill 1437 applies.

We are unpersuaded that Cortez may obtain relief under Senate Bill 1437 without first proceeding under the section 1170.95 petition procedure. The reasoning of *Martinez* is sound. The overriding legislative intent in enacting Senate Bill 1437 was to assign murder liability (and associated prison sentences) commensurate with a person's individual culpability. Senate Bill 1437 created a procedure for the trial court to make that determination—"a detailed set of provisions designed to extend the statute's benefits

retroactively." (*Dehoyos*, *supra*, 4 Cal.5th at p. 603.) As the People point out, granting Cortez relief on direct appeal would deprive the prosecution (and Cortez) of the right to present new or additional evidence pertaining to his entitlement to resentencing, which is a right not available to the parties on appeal.[2] Although a trial court need not determine a defendant's risk of danger to public safety like with Propositions 36 and 47, under Senate Bill 1437 the court makes determinations related to the defendant's degree of culpability for murder, i.e., his or her "own actions and subjective mens rea." (Stats. 2018, ch. 1015, § 1, subd. (g).)

Moreover, it would not be futile or a waste of judicial resources for Cortez to proceed via the section 1170.95 petitioning process. The parties agree that he was not the actual killer, but there has been no finding regarding whether he acted with malice.[3] Suffice to say, under section 1170.95, the trial court must consider a petition for relief in the first instance, hear any relevant evidence, and make any necessary findings. And assuming Cortez is entitled to vacatur of his murder conviction, the trial court will still need to resentence him on his conviction for conspiracy to commit assault with a deadly weapon or with force likely to produce great bodily injury (count 1).

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2 Cortez argues that this right to present new evidence is constitutionally suspect. That issue is not ripe for decision. At this juncture, we are merely trying to ascertain legislative intent regarding the manner in which Senate Bill 1437 may be retroactively applied.

3 This court's decision on his petition for writ of habeas corpus did not resolve that question. (*Cortez IV*, *supra*, at pp. 19-20].) Likewise, there has been no prior finding by a court or jury regarding whether Cortez acted with reckless indifference to human life or was a major participant in the felony. (§ 1170.95, subd. (d)(2).)

In summary, we conclude Cortez must proceed via the section 1170.95 petition procedure to obtain ameliorative benefits under Senate Bill 1437.

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

GUERRERO, J.